NO. 38325-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROGER MULWEE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Liem Tuai, Judge
The Honorable Michael Trickey, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHERS (CONT'D)

A. ASSIGNMENTS OF ERROR

1. The trial court erred by giving Instructions 2 and 4, which allowed the jury to convict Mulwee of an uncharged alternative means of first degree assault.[1]

2. Mulwee was denied effective assistance of counsel at trial.

3. Mulwee was denied conflict-free counsel to present his claims of ineffective assistance and to represent him at sentencing.

4. The prosecutor violated Mulwee's constitutional right to remain silent by commenting on his exercise of that right.

5. Prosecutorial misconduct denied Mulwee a fair trial.

6. The trial court erred by giving the following oral instructions:

> Ladies and gentlemen of the jury, you have been instructed that the State has the burden of proving beyond a reasonable doubt its case.
>
> . . .
>
> Again, ladies and gentlemen, you've been instructed that the burden of proof to prove the crime is totally on the State through the plaintiff's case.

RP 242-43.[2]

7. The trial court erred by giving an aggressor instruction. Instruction 10 (CP 21, attached as Appendix E).

8. The trial court erred by prohibiting the defense from cross-examining the alleged victim regarding his prior convictions for assault, making threats, and delivery of narcotics.

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[1] The Information, CP 1, is attached as Appendix A. Instructions 2 & 4, CP 13 & 15, are attached as Appendices B & C.

[2] RP refers to the verbatim report of the trial proceedings on December 4, 5, and 6, 1995. RP (Sentencing) refers to the verbatim report of the sentencing proceeding on March 15, 1996. Other proceedings are referenced as RP (date).

9. Mulwee was denied an adequate record for review.

10. The trial court erred by entering a restitution order in Mulwee's absence.

Issues Pertaining to Assignments of Error

1. Did the instructions that allowed the jury to convict Mulwee of an alternative means of first degree assault with which he was not charged violate his constitutional right to notice of the charge against him? (Assignment of Error 1)

2. Even if the jury rejected Mulwee's claim of self-defense, there was ample basis for it to conclude that Mulwee was guilty of the lesser included degrees of second or third degree assault, which carry far less onerous penalties, rather than first degree assault as charged. Did defense counsel's failure, without consulting Mulwee, to offer instructions on the lesser included degrees deprive Mulwee of his rights to lesser degree instructions and to effective assistance of counsel? (Assignment of Error 2)

3. Was Mulwee also denied a fair trial by the following deficient performance of defense counsel: failure to object to the instructions allowing conviction on an uncharged means and to the aggressor instruction, failure to object to much of the repeated prosecutorial misconduct in closing argument, and failure to impeach the alleged victim by cross-examining him regarding a conviction for false reporting that the trial court had ruled admissible? (Assignment of Error 2).

4. Prior to sentencing, Mulwee made a pro se motion for a new trial alleging, among other grounds, that he would have requested instructions on the lesser degrees of assault, but his trial attorney never informed him of that option. The trial court did not inquire into the resulting conflict between Mulwee's interest in demonstrating ineffective assistance and his attorney's interest in avoiding a

malpractice claim. The attorney continued to represent Mulwee, and cut short Mulwee's attempt to explain how the attorney failed to discuss the instructions. Did the actual conflict between Mulwee's interests and his attorney's deprive him of representation on his motion for a new trial and at the sentencing hearing? (Assignment of Error 3).

5. The prosecutor argued that the jury should reject Mulwee's testimony because he had not told the arresting officers that he acted in self-defense, and because he did not "say that in August, September, October, November [the months between arrest and trial]." Was this comment on Mulwee's right to silence prejudicial constitutional error requiring reversal? (Assignment of Error 4).

6. Did the prosecutor's repeated argument that the jury could only find self-defense if it believed all of Mulwee's testimony, his claim that the State need only prove the four elements listed in the "to convict" instruction, and his suggestion that the standard for acquittal was the same as that for conviction, all impermissibly shift the burden of proof on self-defense to Mulwee, depriving him of the constitutional right to have all elements of the charge proved beyond a reasonable doubt? (Assignment of Error 5).

7. The trial court orally instructed the jury, in regard to the prosecutor's burden-shifting argument, that the State had the burden of proving "its case." However, the "to convict" instruction did not list absence of self-defense as an element of the offense. Were these instructions inadequate to overcome the prosecutor's improper burden-shifting arguments, and to make the State's burden of disproving self-defense manifestly apparent to the jury? (Assignments of Error 5 & 6).

8. Did the prosecutor's additional flagrant and ill-intentioned

misstatements of law regarding the "no duty to retreat" instruction, the aggressor instruction, and the subjective standard for evaluating self-defense unconstitutionally relieve the State of disproving self-defense and deny Mulwee a fair trial? (Assignment of Error 5).

9. Did the trial court err by giving an aggressor instruction when there was no evidence of any aggressive act, other than the alleged assault itself, thus making it likely that the jury wrongly concluded that self-defense was not available? (Assignment of Error 7).

10. The alleged victim's credibility was central to the State's case. Although he had a lengthy record of convictions for assaultive behavior and other crimes, he portrayed himself at trial as a peaceful and law-abiding person. Did the trial court abuse its discretion and violate Mulwee's constitutional rights to confront witnesses and present a defense by prohibiting Mulwee from impeaching the witness's credibility through cross-examination about the prior convictions? (Assignment of Error 8).

11. The court reporter present for the pretrial hearing did not prepare a report of proceedings, and the trial court determined that it is not possible to reconstruct the missing record. If this Court were to find that the existing record is inadequate to review the issues Mulwee raises, do Mulwee's right to appeal and his due process right to an adequate record require reversal? (Assignment of Error 9).

12. Mulwee explicitly refused to waive his presence at a restitution hearing. Was his constitutional right to be present violated when the trial court entered a restitution order signed by the prosecutor and defense counsel, but not by Mulwee, without holding a hearing? (Assignment of Error 10).

B. STATEMENT OF THE CASE

1. Procedureal Facts

The King County Prosecutor charged Roger Mulwee by information with first degree assault in violation of RCW 9A.36.011(1)(a), with a special allegation that he was armed with a deadly weapon at the time, in violation of RCW 9.94A.125 and 9.94A.310. CP 1. The trial court instructed the jury on the elements of both RCW 9A.36.011(1)(a) and RCW 9A.36.011(1)(c), an alternative means of first degree assault with which Mulwee was not charged. CP 15. The jury returned a general verdict of guilty of first degree assault, and specially found that Mulwee was not armed with a deadly weapon at the time of the offense. CP 30, 31. The trial court imposed a standard range sentence of 93 months. CP 41-46. Mulwee appeals. CP 47.

2. Substantive Facts

The case arose from an altercation on August 5, 1995, in which Roger Mulwee stabbed Franklin Patton several times. Patton alleged that Mulwee stabbed him without provocation. RP 39-40, 43. Mulwee testified that he acted in self-defense after Patton attacked him with a knife. RP 189-90.

a. Pretrial Proceedings

The case was assigned to the Honorable Liem Tuai. The court held pretrial hearings on November 30, 1995. Although Mulwee requested transcription of those proceedings, no report of proceedings was prepared. See § B(2)(e), infra. According to the clerk's minutes, defense counsel made a motion to cross-examine Patton and to introduce his prior convictions as relevant to credibility.[3] The court

[3] Patton has felony convictions in King County for three counts of second degree assault (1982) and one count of VUCSA delivery (1985), and misdemeanor convictions for assault (1984), false reporting (1985) and threats (1994). According to the certification for determination of probable cause filed by the King County Prosecutor in Case No. 95-1-07466-5 (charging Patton with felony violation of a court order), Patton also has four Illinois convictions

ruled that the defense could use Patton's conviction for false statements, but denied the motion to admit the threats and VUCSA convictions. The court also ruled the assault convictions not admissible "unless counsel can show authorization to indicate otherwise." Supp. CP ___ (Sub. No. 41A, Clerk's Minutes, 11/30/95), attached as appendix G The court conducted an in camera review of police reports regarding a domestic violence charge against Patton and ruled they were not admissible. After a CrR 3.5 hearing, the court denied the defense motion to suppress statements Mulwee made. Appendix G.

The remainder of the proceedings were transcribed. The next day, defense counsel renewed his motion to introduce Patton's 1982 assault convictions under ER 609. Counsel cited State v. Jobe, 30 Wn. App. 331, 633 P.2d 1349 (1981), and noted that in the present case credibility would be the central issue. RP 2-4. Counsel explained that Patton was sent to prison for violating parole conditions of the 1982 conviction, and was not released until 1994, one year before trial. RP 3, 8. The prosecutor asserted that the ten year time limit in ER 609 did not work like the SRA washout provision, so that confinement on the parole violation could not be counted. RP 7. The court reaffirmed its prior ruling, saying "a conviction in 1982 . . . just simply cannot have enough probative value, and it's highly prejudicial." RP 8.

b. Trial Testimony

Mulwee testified that he was homeless, and helped out at a shelter. He also did landscape work and painting. Mulwee was 45 years old. He acknowledged that he suffers from alcoholism. On the morning of August 5, 1995 (a Saturday), Mulwee

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for second degree assault and one for Strongarm Robbery, and "is clearly a dangerous individual." Appendix F. The documents in Appendix F were provided to appellate counsel by trial counsel. They are the subject of a motion to supplement the record in this Court, based on the missing pretrial transcript.

was not working. He got two bottles of wine and was drinking it in front of the Turf restaurant near the Pike Place Market. RP 153-56, 224. Around 7:00 a.m., Jeffrey Seeman, an acquaintance who was a security guard at a nearby building, told Mulwee he should not be drinking. RP 196-97. Although he had been drinking, Mulwee did not feel he was drunk at the time of the incident. RP 199-200.

The encounter with Patton happened around 8:30 a.m. RP 198. Mulwee was sitting on a drain pipe in front of the Turf, drinking his wine. A man across the street was yelling about being a Vietnam veteran and saying things like "kill them all and let God sort them out." Mulwee began yelling similar things back; he was not sure exactly what he was yelling. The men were laughing and yelling back and forth. RP 156-57.

Patton first walked past Mulwee, and then stood around looking at him as he was yelling at the man across the street. Patton came up and started "getting in my face." Mulwee was sitting down, and Patton got down and was yelling at him. Mulwee yelled back; both men were swearing. Patton was aggressive and was standing right over Mulwee. RP 157-60.

Patton then put his hands on Mulwee. RP 161. Mulwee started to stand up, and Patton grabbed Mulwee's left arm. Mulwee could not pull his arm away. Patton's other arm was circled around his body. When Patton grabbed him, Mulwee knew he was in a fight. In response to the prosecutor's question, he stated that he felt he was in danger of imminent bodily harm. At that point, Mulwee did not fear a weapon was involved. RP 200-03.

Mulwee did not have a knife. RP 189. In response to Patton's attack, Mulwee grabbed at Patton's hands, and the two men started to wrestle, then fell to the ground. At this point, Mulwee realized that Patton had a knife and had dropped

it. Mulwee did not see the knife, but he heard a clanking sound when it fell on the ground. Mulwee saw the knife on the ground like it might have fallen out of Patton's sleeve. RP 162-64, 168.

Mulwee was very concerned about the knife, in part because he had been attacked and stabbed by two men on July 8, less than a month earlier. In that incident, he was returning to the shelter when two men blocked his way. He swore at them and walked through them. As he passed, he was struck in the back. He turned around and was hit in the head with a blunt instrument. When they tried to stab him again, he grabbed at the knife and then ran away. Mulwee showed the jury the scars on his back and hand from that stabbing. RP 163-65. Mulwee was treated at the emergency room for the July attack. Although he remembered the incident fairly well, he told hospital staff he did not remember, since his attackers had not been caught. RP 212-13.

When Mulwee saw the knife as Patton attacked him on August 5, he "freaked out." He thought he would be killed, as he almost had been in the earlier attack. RP 165-66. He feared for his life because of the earlier stabbing. RP 214. Mulwee located and grabbed the knife as the two men fell to the ground. RP 205. He wanted to get the knife before Patton did. RP 210.

After they fell to the ground, Patton was on top of Mulwee. He was holding Mulwee with one harm, and pounding Mulwee's head onto the concrete with his other hand. RP 166, 170. At this point a second man was also on top of Mulwee. RP 170, 209. That man was telling Mulwee to drop the knife he had picked up. Mulwee was "pretty much buried" by the two men. He was telling the men to get off of him. RP 179-80.

Mulwee started to stab at the men. He would not have done so if they had

gotten off him. Mulwee could only stab in a round-about motion. RP 180-81. Mulwee stabbed in the only way he could. He was angry and not sure what he intended. However, he did not aim for the heart or for anywhere else. Mulwee could not see where he was stabbing. He stabbed Patton more than once but did not know how many times. Mulwee testified that he was not a killer, and that there was no other way for him to do it: he was on the ground with two men on top of him and one of his hands was pinned. All he could do was strike out with the other hand. RP 210-12.

The second man got off Mulwee, and Patton kind of rolled off. Mulwee got up and walked away from Patton. He did not stab him again. Mulwee picked Patton up and screamed at him because he was angry. However, he did not kick Patton, and tried to get away from him. Patton did not disarm Mulwee. Mulwee threw the knife across the street because he wanted to get it away so he would not be stabbed again. RP 183-84.

Mulwee continued yelling, and people were yelling back at him. He was upset and said he was going to kill all of them. He was trying to tell the police that the other men attacked him. RP 185-86. Mulwee felt the officers were mistreating him. He did not remember if he said that he would kill the officers. RP 216. Mulwee was taken to jail; later that afternoon he was treated at Harborview. RP 187, 221-22.

While in jail awaiting trial, Mulwee met Clarence Herne in a holding cell. Mulwee had never met him before. Herne asked if Mulwee had been in a fight with two men in front of the Turf, and stated he had witnessed the fight. At this point, Mulwee told Herne to hold it, and got his name so he could call his lawyer. He never talked about the case with Herne because he did not want to prejudice the case. RP 188-89.

Mulwee had never seen Patton prior to the incident. RP 194. Mulwee did not know what his second attacker looked like. He could not tell if that man was Daniel Richard, a witness who testified that he intervened in the fight between Mulwee and Patton. RP 219.

Clarence Herne testified that he ate breakfast at the Turf restaurant on the morning of the incident. He saw Mulwee, whom he did not know, in a fight with two other men outside the restaurant. Herne was not paying attention, so he did not know how the fight started. The two men had Mulwee on the ground. Both of them were on top of him. One was slamming his head on the sidewalk. The other man had a knife. Mulwee took the knife and began stabbing the man. Herne did not see how Mulwee got the knife from the man. Mulwee was telling the men to get off him as he was stabbing. RP 132-35. Herne later saw Mulwee in a police car. Herne did not talk to the police because he tries to avoid them. RP 139.

Later, Herne saw Mulwee in jail and remembered him from the fight. He gave Mulwee his name, and Mulwee's attorney came and spoke to him in jail. Herne learned Mulwee's name from the attorney. He did not have any other conversations with Mulwee. Herne testified because Mulwee was protecting himself and the incident was not his fault. RP 140, 149-51.

Dr. Copass, the director of emergency services at Harborview Medical Center, testified about Mulwee's injuries on July 8 and on August 5. On July 8 Mulwee was treated for a stab wounds to the hand and back. The back wound was a three inch laceration that was deep enough to generate significant bleeding. Mulwee also had a small laceration in the left ear. RP 121-24. According to the medical records, Mulwee said he did not remember the July 8 stabbing at the time he was treated for it. RP 128.

On August 5, Mulwee had been hit multiple times in the head. He had multiple contusions to the right temple, and bleeding in the left ear canal. RP 125-26.

Jeffrey Seeman, a security guard in the Newmark building at Second and Pike, testified for the State. He testified Mulwee was a local customer who got coffee in the building. Seeman sometimes had coffee with Mulwee. He knew Mulwee as a nice gentleman. Seeman stated that Mulwee was an amiable person and was not a threat to anybody. RP 25, 29, 32.

On August 5, Seeman was on his way to work shortly before 7:00 a.m. He ran into Mulwee near the Turf restaurant. Seeman thought that Mulwee appeared to have been drinking, and noted that he had never seen him that way before. Mulwee told him he was upset and not feeling well. Seeman told Mulwee he could not drink there and to throw the drink away. Mulwee was in a bad mood and was saying things like he was so mad he could kill somebody. Mulwee got angry when Seeman told him he could not drink where he was. RP 26-28.

Mulwee only made the statement about killing someone after he was upset. Seeman did not think Mulwee would hurt anyone. Mulwee did not threaten Seeman, and he did not feel threatened or menaced. Seeman noted that it was not uncommon to see homeless people, or people getting drunk, in that area near the Market. Seeman left Mulwee and went to work. He did not see Mulwee in a fight. At around 8:45 a.m. Seeman went by the Turf and saw the police arresting Mulwee. RP 29-32.

Franklin Patton testified that he was 34 years old, and received disability payments for a stress disorder. RP 33-34. Patton was "doing a lot of partyin' [sic] the day before" the incident. He was drinking that night and could have been using cocaine. Patton denied that he had used cocaine or alcohol on the day of the incident. When asked if he was intoxicated that morning, he said it was "more of a hangover."

Patton insisted that he remembered everything from that day. RP 42-43, 46-47.

Patton said that he was going to the Pike Place Market to browse. RP 47. Along the way, he bought some chicken and stopped to eat it. Patton claimed that he was not angry or upset, and had no weapons. According to Patton, he noticed a man sitting near the Turf Restaurant. The man was shouting and appeared angry and upset. RP 34-36.

The man got to his feet, and began making comments about a knife and stabbing someone. Patton did not take them seriously because he did not see a knife. At first the threats were not directed, but then, according to Patton, the threats were directed toward him. Although the man was speaking to him, Patton did not run because he did not take him seriously. Patton claimed that as he turned to leave, the man lunged at him. Patton said that it felt like the man was hitting him with his hand, but that after the third strike he realized he was being stabbed with a knife. RP 37-39.

Patton alleged that after the third blow, "I rushed him and subdued him and disarmed him." He claimed that he knocked the man to the ground and took the knife out of his hand. RP 40. Patton insisted that he took the knife out of Mulwee's hand and disposed of it on the ground. As Patton was getting up, a police officer arrived and handcuffed the person who had stabbed him. Patton stated that he did not know what happened to the knife. RP 56. Patton spent two days in the hospital following the incident. He showed the jury a scar on his chest. RP 44.

Dr. Gersten, who is with the University of Washington residency group, testified to Patton's condition. At the time of his admission on August 5, Patton's blood alcohol level was .267. The doctor described this as significantly elevated, and stated that he would consider Patton intoxicated. A urine screen also indicated there was cocaine in Patton's blood at the time of his admission. RP 67-68.

Patton had several wounds on his chest. At the time Gersten saw Patton for follow-up treatment, the wounds were stable and were likely to heal fine, "with no other damage other than cosmetic consequences." RP 63. However, when first admitted, Patton's lung was collapsed, and he had to be treated with a flutter valve to allow the lung to re-expand. Without treatment, a collapsed lung has the potential to cause death. RP 64-66. The stab wounds were the most likely cause of Patton's collapsed lung. The wounds were 1-3 centimeters long and were more than superficial. RP 71-72.

Seattle Police Officer Meyer responded to the fight at the Turf restaurant. He saw Mulwee in a physical scuffle with another person. Meyer identified himself and hollered stop. Mulwee broke away and made a throwing motion. Meyer heard something impact on the building housing the Fantasy Unlimited store. Meyer later recovered a knife where he heard the impact. The knife was introduced into evidence. RP 74-77; Ex. 2.

Meyer "secured" Mulwee. RP 75. Mulwee was agitated and extremely verbal. He was shouting threats and obscenities. According to Meyer, the first thing he said was "I told them I was going to kill someone." He also told the officer that he would kill him. Meyer opined that Mulwee appeared to be under the influence of intoxicants. Meyer did not question Mulwee at this point. RP 81-82. Meyer testified that Patton was initially standing, but then fell and lost consciousness. Patton's color was going ashen from internal bleeding, and Meyer felt time was crucial. When the aid crew arrived, Patton's blood pressure was dropping rapidly. RP 82-83.

Daniel Richard and his wife had breakfast at the Turf. When they left, he noticed a man he identified as Mulwee talking loudly but did not pay attention to him. Richard and his wife returned to the restaurant, and Richard heard Mulwee yelling at

another man. Daniel testified that he turned away, and when he turned back around he saw the men were fighting. Richard did not see a knife or see either man make any aggressive moves during the argument. He only saw the knife after the blows started. Richard claimed that as the men fell to the ground, Mulwee's shirt came up and he saw him hitting the other man with a knife. The other man fell on top of Mulwee. Richard testified that he ran over and put his foot over the knife. RP 92-99.

Richard stated that the other man did not disarm Mulwee. After Mulwee got up and the police arrived, Mulwee threw the knife across the street. RP 100.

Thomas Bianchi, the assistant manager at Fantasy Unlimited, noticed two men struggling on the ground. He saw both participants moving their arms quite a bit, but could not see any distinctive blows. He could not tell who was getting the better of the struggle. As the men separated, Bianchi saw the man who was subsequently arrested throw something toward the building Bianchi was in. When it hit the window in front of Bianchi he realized it was a knife. RP 101-07.

c. Prosecutor's Argument

In closing argument, the prosecutor made the following comments about Mulwee's failure to tell the police he had acted in self-defense:

> He's a talker. He likes to talk. Yet, when he came into contact with the officer, did he say, oh, no, I was only defending myself? Did he say, no, I was attacked by these two people? Did he say, no, the knife belonged to this other guy and I took it from him and, I had to stab him because I thought I was about to be injured? No, he didn't say that in August, September, October, November, yet he told the 12 of you that when he was on the stand.

RP 241.

The prosecutor argued that defense witness Clarence Herne was not believable. He suggested that the jury would not even consider convicting a person

based on Herne's testimony, and then argued:

> And if you wouldn't consider convicting a person based on this testimony, then why on earth would you--

RP 242. Defense counsel objected on the ground that the prosecutor was improperly arguing that the defense had the same burden of proof as the State. The court told the jury that they had been instructed that the State had the burden of proving its case beyond a reasonable doubt. Id.

Moments later, the prosecutor reiterated that the jury would not have convicted someone based on Herne's testimony and then asked, "If you wouldn't let me use evidence like that, why should he be able to?" RP 243. Defense counsel again objected, and the court told the jury "you've been instructed that the burden of proof to prove the crime is totally on the State through the plaintiff's case." RP 243.

The prosecutor spent much his closing argument discussing how the jury instructions related to Mulwee's claim of self-defense.[4] Toward the beginning of his argument he said:

> [T]he defendant here claims that he acted in self-defense. That is only a defense if the 12 of you absolutely, positively believe him. The 12 of you believe that the offense happened exactly they way he said they. [sic] Only if you believe that, it's a defense. If you don't believe it, if there is no evidence to support it, it is not a defense to the crime that he committed.

RP 236. A little later, the prosecutor discussed the "to convict" instruction:[5]

> And what this does, it tells you what the elements of the crime are that the State must prove beyond a reasonable doubt. And when you are back in the jury room deliberating, remember, there are only four things that the State must prove beyond a reasonable doubt and those four things are contained on this form. Those are the only four. See,

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[4] Defense counsel did not object to these remarks.

[5] See Appendix C.

> you can have questions about a lot of other things, but the only reasonable doubt that the State must overcome are contained on this form.

RP 237-38 (emphasis added). The prosecutor then paraphrased the four elements. Id.

Later, he mentioned the portion of the self-defense instruction, number 8, which stated that the person using force may employ such force and means as a reasonably prudent person would under similar circumstances:

> So you have got to find that he was acting as a reasonable person in order for him to say he was acting in self-defense. If you believe he was acting unreasonable [sic], he can't use self-defense.

RP 247.

In rebuttal closing, the prosecutor again stated that "[i]n order to use self-defense the 12 of you must believe he's entitled to it." RP 284-85. He continued:

> If the 12 of you believe the defendant was telling you the truth, that the force he used was necessary, that he was in imminent danger of bodily harm and that there was no effective use or alternative to the use of force and if the twelve of you believe that his actions did not provoke, did not create the need for using self-defense, then you have an issue of self-defense that you must consider.

RP 285.

Discussing Instruction 12, the "no duty to retreat" instruction, the prosecutor told the jury that Patton did not need to avoid Mulwee, but had a right to stand his ground. He then stated:

> But that law is based on the fact that the person has a right to be where they are. So that instruction doesn't apply to the defendant. He didn't have a right to be there. The security guard already told him to move, you cannot drink here, you must move. He didn't have a lawful right to be there.

RP 284.

> Citing the aggressor instruction, number 10, the prosecutor asserted: And so what that means is that if the 12 of you go back in the jury room and you say that the defendant is shouting on the street corner, that if someone comes next to me I'm going to kill them, you better leave me alone. If you think and believe that his conduct provoked this fight with Mr. Patton, then he is not entitled as a matter of law to say he acted in self-defense.

RP 245-46.

d. Post-Trial Motions and Sentencing

The jury returned its verdicts on December 6, 1995. CP 30, 31. Sentencing was originally set for January 12, 1996, but was continued to February 7, 1996, and then to March 15, 1996. On January 12, the court denied the motion for a new trial, based on inconsistent jury verdicts, filed by defense counsel. See CP 32-34. A motion for new counsel was made on February 7, but the court did not rule on the motion. Supp. CP ___ (Sub. Nos. 55 & 57, Clerk's Minutes); RP (2/9/96) 6, 8-9.

Prior to the March 15 sentencing hearing, Mulwee sent to the trial court a pro se motion setting forth 14 grounds for a new trial. RP (Sentencing) 26.[6] In the written motion, Mulwee argued that he was entitled to instructions on the lesser offense of second degree assault but that his attorney never discussed the instructions with him. Mulwee also argued that his attorney provided ineffective assistance by failing to discuss the case, failing to cross-examine Patton regarding his false reporting conviction, failing to have Patton's other convictions admitted, and misstating the evidence in closing. He noted that he moved for new counsel prior to trial but the attorney persuaded him to withdraw the motion. Appendix D, New Trial Issues 1, 3, 5, 6, 7, 12, 13 and 14; see Supp. CP ___ (Sub No. 15, Clerk's

[6] Copies of the material in the judge's file were provided to appellate counsel for Mulwee, and are attached hereto as Appendix D.

Minutes 9/19/95).

At the March 15, 1996, sentencing hearing, defense counsel argued for an exceptional sentence of 18 months rather than the standard range of 93 months. Counsel noted that 18 months was twice the top of the range Mulwee would have faced if he had been convicted of second rather than first degree assault. He argued that the jury very likely felt Mulwee's use of force in response to the threat was more than necessary, amounting to a claim of "imperfect self-defense," which constituted a mitigating factor. Counsel also noted that the evidence supported a finding that the victim was a participant, another mitigating factor. Counsel pointed out that the jury acquitted Mulwee of the deadly weapon allegation, even though there was no dispute that he had used a knife. He suggested that some jurors may have found self-defense, others did not, and they "split the baby in half." Counsel argued that the evidence supported the mitigating factors. RP (Sentencing) 5-12.

Mulwee addressed the court. RP (Sentencing) 20-25. At the end of his statement, he attempted to show the court a case holding that second degree assault instructions should be given in a first degree assault prosecution. After the court declined to view the case, Mulwee attempted to raise his motion for a new trial:

> [MULWEE:] I believe that the instructions to the jury, nobody ever showed them to me or discussed them with me at any time. And when they handed them out at the at [sic] trial, I was sitting right there. When I got my copy, and at the same time all the jurors got theirs, and I was taken to a holding cell for five hours. And at that time, I read the instructions to the jury, Your Honor, and I never saw the lesser included offense of second degree assault, which I believe in my heart, that I never denied stabbing Mr. Patton, but I did that in self-defense. So I don't believe that I could ever have been found guilty of first degree assault. I didn't intend to hurt this man. I never would have attacked him. He attacked me. I think that if the jury would have had the instructions of second degree assault in there, then the penalty is substantially less, Your Honor, it's only six to nine months, compared to first degree assault. And I can't say -- I

> could go on and on about fourteen more reasons why I believe I should have a new trial, but I don't want to make you mad, Your Honor, I'll just --
>
> THE COURT: If you want to make your statement, Mr. Mulwee, this is the time to do it. It won't make me mad.
>
> [MULWEE:] Well, I [have] about fourteen reasons why I should, I believe I should have a new trial, Your Honor.
>
> [DEFENSE COUNSEL:] Your Honor, perhaps I could summarize. Mr. Mulwee feels that I should have offered assault in the second degree as a lesser included offense. What I have told him is that all aspects of the trial, including my level of competence, will be addressed at the appellate stage. And I think he wants to bring that before this court, but I have advised him there is another forum for that which is more appropriate. What we're really here for today, I have advised him, is consideration of sentencing. And we think that regardless of Mr. Mulwee's feelings about assault in the second degree, the reason why I'm bringing up assault in the second degree to the court is I think that that is a reasonable starting point to consider what, if any, exceptional sentence to impose.

RP (Sentencing) 25-27.

Following counsel's summary, Mulwee asked to make a record that he had not been provided a hearing aid for the preliminary proceedings that were not heard by the trial judge. RP 27-28. The court then made an oral ruling that the grounds raised for an exceptional sentence were legally insufficient. RP (Sentencing) 28-35.

The prosecutor subsequently addressed Mulwee's contention that his attorney failed to advise him of lesser degree instructions, noting that the issue was in the record for appeal, and that only defense counsel could state whether the instructions were in fact discussed. The court said it would not require defense counsel to address the issue unless he wished to do so. Counsel declined, citing the attorney-client privilege.[7] The prosecutor argued that the privilege was breached by an appeal

[7] In the subsequent proceedings regarding the missing transcript, trial counsel acknowledged that Mulwee was not making his claims of ineffective assistance merely for purposes of appeal: "He complained bitterly about my representation of him all throughout the course of the proceedings to me, to my supervisors, to anybody within earshot, as far as I could

raising ineffective assistance, and defense counsel responded that no appeal had yet been filed. The court directed defense counsel not to respond on the issue. RP (Sentencing) 37-39. The court did not inquire into the existence of a conflict of interest between Mulwee and his attorney, or appoint new counsel for Mulwee to address the issues raised by the prosecutor and trial attorney.

The trial court indicated that the range of 93-123 months was severe, but stated it felt compelled to follow the law. The court imposed a sentence of 93 months. The court ordered restitution, with the amount to be determined within 60 days or be waived. Mulwee declined to waive his presence at the restitution hearing, and the judgment and sentence form was amended to reflect that fact. RP (Sentencing) 40, 45; CP 41-46.

Judge Tuai retired on April 1, 1996. Supp CP ___ (Sub No. 82). Without holding a hearing, his successor entered a restitution order on May 14, 1996 (exactly 60 days after the sentencing). The order was signed by the prosecutor and defense counsel, but not by Mulwee. It required Mulwee to pay $7,422.28 in restitution. Supp. CP ___ (Sub No. 68).

e. Proceedings Regarding Report of Proceedings

Jerry Trego, the court reporter for the November 30, 1995, pretrial hearing where the court ruled on Patton's prior convictions, was not available to transcribe those proceedings. This Court remanded for the trial court to determine if the record could be reconstructed. Supp. CP __ (Sub No. 74, Commissioner's ruling).

The Honorable Michael Trickey, the trial judge's successor, conducted hearings on April 17, April 29, June 6, and June 10, 1997, regarding the missing

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see." RP (6/10/97) 4.

record. With regard to attempts by other court reporters to transcribe Mr. Trego's notes, the court noted that due to the number of cases Trego had failed to transcribe it would be months before they even got to Mulwee's case. RP (6/6/97) 6. Based on principles of judicial economy and fairness to the appellant, the court concluded that it was not an option to wait months for possible transcription of the reporter's notes. RP (6/6/97) 20. The court recognized that the existing record might be sufficient for review, but stated that issue was not before it. RP (6/6/97) 7, 19.

Although Judge Tuai took some notes of the case, he had no notes for November 30. RP (4/17/97) 13-14. Judge Tuai responded to Judge Trickey's request for assistance in reconstructing the record of the November 30 proceedings with some information about the CrR 3.5 hearing, but did not discuss his ruling on Patton's prior convictions. He indicated that he could not provide any further assistance. Supp. CP ___ (Sub No. 82).

The prosecutor initially argued that the record could be reconstructed based on his own notes and those of Mulwee's trial attorney. RP (4/17/97) 5-7. The prosecutor subsequently acknowledged that he had no notes of Mulwee's trial, but then claimed that he had "a very good memory" of the testimony at the CrR 3.5 hearing. RP (4/29/97) 17; RP (6/6/97) 13.

Mulwee and his former trial attorney both objected to the attorney's participation in any attempt to reconstruct the record, given the claims of ineffective assistance being raised on appeal. RP (4/17/97) 7-8, 12; RP (4/29/97) 15; RP (6/10/97) 4.[8] Mulwee, through counsel, argued that he was entitled to an accurate

[8] Undersigned appellate counsel was present at the hearing in the trial court pursuant to this Court's remand order. New trial counsel was not appointed for Mr. Mulwee, despite the conflict of interest with his former counsel. Mr. Maxwell, Mulwee's former counsel, also appeared at the hearings in response to this Court's directive.

record, not one that was prepared by the State that was prosecuting him and an attorney who was allegedly ineffective and would have a motive to protect his own interests. RP (6/6/97) 17. The trial attorney, citing the claims against him, stated that he could only participate in constructing the record if ordered by the court. RP (6/10/97) 4.

The court reviewed the trial attorney's notes, which he described as "scant," and concluded that the notes would not help in reconstruction without the attorney's participation. The court did not interpret this Court's remand ruling as authorizing contempt proceedings against the trial attorney. Supp. CP ___ (Sub No. 84, Status Report).

The court concluded that it is not possible to reconstruct a verbatim or narrative report of proceedings for the November 30, 1995, hearing. Id.; RP (6/6/97) 6-8. The state has not sought review of that ruling.

C. ARGUMENT

1. THE CONVICTION SHOULD BE REVERSED BECAUSE THE INSTRUCTIONS ALLOWED THE JURY TO CONVICT MULWEE OF AN UNCHARGED MEANS OF FIRST DEGREE ASSAULT.

Assault in the first degree may be committed by any of three alternative means:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
>
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
>
> (b) Administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
>
> (c) Assaults another and inflicts great bodily harm.

RCW 9A.36.011.

The State charged Mulwee with only the first means: assaulting Patton with a deadly weapon or force and means likely to produce great bodily harm, in violation of RCW 9A.36.011(1)(a). CP 1; appendix A. The State did not charge Mulwee under RCW 9A.36.011(1)(c), assaulting another and inflicting great bodily harm. CP 1.

However, the court's instructions permitted the jury to convict Mulwee if it found that he committed the crime either by the charged means or by the uncharged alternative of inflicting great bodily harm. CP 13, 15 (Instructions 2 & 4, attached as Appendices B & C). That error requires that Mulwee's conviction be reversed. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996); State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

> This Court's recent holding in Doogan controls this case:
> It is reversible error to try a defendant under an uncharged statutory alternative because it violates the defendant's right to notice of the crime charged.

82 Wn. App. at 188. Both the State and Federal constitutions guarantee a defendant the right to be informed of the charges against him and to be tried only for offenses charged. Const. art. 1, § 22; U.S. Const. amend. 6; State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381, 383 (1997). A conviction on an uncharged means is a manifest error affecting this constitutional right, which can be raised for the first time on appeal. RAP 2.5(a)(3); cf. Doogan, 82 Wn. App. at 188.[9]

The error is prejudicial if it is possible that the jury might have convicted the defendant under the uncharged alternative. Doogan, 82 Wn. App. at 189 (citing

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[9] In Doogan, invited error barred review of the constitutional error, because defense counsel had proposed the instruction on the uncharged means. 82 Wn. App. at 188. Invited error does not apply here because the State proposed Instructions 2 and 4. Supp. CP ___ (Sub No. 40, State's Instructions to the Jury; see instructions citing WPIC 35.03 and 35.08). Defense counsel did not propose a definitional or "to convict" instruction. CP 4-8. Even if invited error were to apply, Doogan went on to hold that the defendant was denied effective assistance, and reversed the conviction, despite invited error. Id., at 189-90.

State v. Severns, 13 Wn.2d 542, 549, 552, 125 P.2d 659 (1942)). In Doogan, the defendant was charged with one means of promoting prostitution: "profiting from prostitution." However, the instructions allowed the jury to convict if it found that Doogan committed either the charged means or the uncharged alternative means of "advancing prostitution." Doogan, 82 Wn. App. at 188. This Court held that the error was prejudicial because the uncharged means covered a wider range of activity than the charged means, and because the jury heard an abundance of evidence that would have satisfied the uncharged means. Id., at 190.

This Court also found an instruction on an uncharged means to be prejudicial error requiring reversal in Bray, 52 Wn. App. at 36. As in Doogan, the fact that there was evidence supporting conviction on the uncharged means increased the prejudicial effect of the error. Id.

The possibility that the jury convicted Mulwee of the uncharged means of first degree assault, and therefore the prejudicial effect of the erroneous instructions, is even greater than in Doogan and Bray. Paragraph (3)(a) of Instruction 4 informed the jury that it could find that the assault was committed with a deadly weapon or by force or means likely to produce great bodily harm (the charged means, RCW 9A.36.011(a)). However, Paragraph (3)(b) informed the jury that it could find that the assault resulted in the infliction of great bodily harm (the uncharged means, RCW 9A.30.011(c)). The instruction further stated that (3)(a) and (3)(b) were alternatives, and only one needed to be proved. CP 15; see Appendix C.[10]

In addition, Instruction 2 defined only the uncharged means: inflicting great bodily harm. It did not define the charged means: using a deadly weapon or means likely to inflict great bodily harm. CP 13; see Appendix B. Thus the error went beyond that in Doogan and Bray because the definitional instruction here limited the jury to considering only the uncharged means.

As in the cited cases, there was considerable evidence here to support the uncharged means. The instructions defined great bodily harm as injury that, inter alia, creates a possibility of death or "which causes significant permanent disfigurement." CP 17. Dr. Gersten stated that the collapsed lung resulting from the stab wounds had the potential to cause death. RP 66, 72. Officer Meyer testified that Patton was bleeding internally and lost consciousness, and that his blood pressure was dropping. RP 82-83. Patton also had a scar and Dr. Gersten said he would have "cosmetic consequences." RP 44, 63.

This evidence was more than sufficient for the jury to find that Mulwee

[10] The prosecutor cited this instruction in telling jury that they only needed to find one of the two alternatives. RP 239.

assaulted Patton and inflicted great bodily harm that created a possibility of death or caused significant serious permanent disfigurement. Such evidence increases the prejudice of the instruction that allowed the jury to convict on this uncharged means. Doogan, 82 Wn. App. at 190; Bray, 52 Wn. App. at 36.

Also, in contrast to the cited cases, there is direct evidence that the jury did rely on the uncharged means to convict. The charged means required the jury to find that Mulwee assaulted Patton with a deadly weapon or some other force or means likely to produce great bodily harm. CP 1. However, the jury was also given a special deadly weapon verdict. The jury specially found that Mulwee was not armed with a deadly weapon at the time of the commission of the charged offense. CP 30.

That finding would directly contradict a guilty verdict based on the charged means of using a deadly weapon or similar force or means. However, a special verdict must be construed to support the general verdict when such an interpretation is possible. State v. Peerson, 62 Wn. App. 755, 765, 816 P.2d 43 (1991), rev. denied, 118 Wn.2d 1012 (1992). Here, the special and general verdicts can be reconciled if the jury convicted Mulwee of the uncharged means of first degree assault, because that means, unlike the charged means, does not involve a deadly weapon finding. See Instruction 4, Paragraph 3(b), and RCW 9A.36.011(1)(c). Therefore, the special verdict that Mulwee was not armed with a deadly weapon strongly reinforces the likelihood that the jury relied on the uncharged means in convicting him of first degree assault.

For all of these reasons, the instruction on an uncharged means was prejudicial, and reversal is required. Doogan, 82 Wn. App. at 190; Bray, 52 Wn. App. at 36. This Court need not address the remaining issues if Mulwee's conviction is reversed for the reasons argued above.

2. MULWEE'S ATTORNEY DID NOT PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL.

A defendant's right to counsel is violated, and reversal required, where the two-prong test of Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2952 (1984), is met: (1) trial counsel's performance was deficient because it fell below an objective standard of reasonableness based on consideration of all of the circumstances; and (2) that the deficient performance so prejudiced the defendant that he was deprived of a fair trial. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Ineffective assistance is determined based on the entire record below. McFarland, 127 Wn.2d at 335. Here, the performance of Mulwee's trial counsel fell below an objective standard of reasonableness in numerous areas.

a. Failure to Object to Erroneous Instructions

Defense counsel did not object to the "to convict" and definitional instructions that allowed the jury to convict Mulwee based on a means of committing first degree assault with which he was not charged. RP 230; CP 13, 15. As shown in argument § C(1), supra, these erroneous instructions created reversible constitutional error. Counsel's failure to recognize or object to the error "fell below an objective standard of reasonableness." Thomas , 109 Wn.2d at 226.

Any reasonably competent attorney would know the elements of the offense with which his client is charged, and act accordingly. See State v. Ermert, 94 Wn.2d 839, 850, 621 P.2d 121 (1980). The error here is egregious: counsel did not recognize the elements of the charged offense, and permitted Mulwee to be convicted of an offense with which he was not charged. See argument § C(1), supra.

Similarly, counsel's failure to object to the erroneous use of an "aggressor" instruction was deficient. A reasonably competent attorney, familiar with the cases holding that aggressor instructions should rarely be given, would have opposed the instruction that could only undermine Mulwee's claim of self-defense. See § C(6), infra.

Although these constitutional errors each require reversal despite the lack of objection, the failure to object to three separate erroneous instructions is part of counsel's woefully deficient performance.

b. Failure to Offer Instructions on Lesser Degrees of Assault

When a defendant is charged with an offense consisting of different degrees, the jury may find him not guilty of the charged offense, and guilty of a lesser degree of the crime. RCW 10.61.003; Peterson, 133 Wn.2d at 889-90. A defendant is entitled to have the jury so instructed when there is evidence that he committed only the lesser degree. State v. Tamalini, 134 Wn.2d ___, ___ P.2d ____, 1998 WL 149455, *3 (1998), slip op. at 4-5.

In this case, Mulwee was charged with the highest of four degrees of assault. CP 1; RCW 9A.36.011. Both second degree assault, RCW 9A.36.021, and third degree assault, RCW 9A.36.031, are lesser degrees of first degree assault as charged. See Peterson, 133 Wn.2d at 889-90 (quoting State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)) ("both the first-degree and second-degree assault statutes proscribe but one offense--that of assault")). The jury should have been given the opportunity to determine whether to convict Mulwee of one of these lesser degrees rather than the charged offense. RCW 10.61.003; Tamalini, 1998 WL 149455, *3; slip op. at 4-5.

Given the evidence presented, there was ample basis for the jury to find that Mulwee committed only second or third degree assault rather than first degree. RCW 9A.36.021 provides in pertinent part:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
>
> . . .
>
> (c) Assaults another with a deadly weapon[.]

RCW 9A.36.031 provides in pertinent part:

> (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
>
> . . .
>
> (d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or
>
> . . .
>
> (f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause

considerable suffering[.]

Unlike first degree assault as charged, neither second nor third degree assault requires proof that the defendant intended to inflict great bodily harm. In this case, the evidence that Mulwee intended to inflict great bodily harm was weak at best. Mulwee testified that he was not a killer and was not aiming to stab Patton in any particular place. Indeed, he could not even tell where he was stabbing. Mulwee was simply stabbing in the only way he could at Patton and the other man on top of him, in order to get them off him. RP 211-12. Once the men got off him, Mulwee got up. He did not continue stabbing, but instead threw the knife away so he could not be attacked with it. RP 184-85, 220.

In order to find beyond a reasonable doubt that Mulwee intended to inflict great bodily harm, the jury would have had to completely reject Mulwee's testimony that he was merely trying to get the two men off himself, and was not trying to inflict any particular harm on them. None of the State's witnesses except for Patton contradicted Mulwee's testimony in any significant respect. In particular, none of them saw who initiated the fight between Mulwee and Patton, nor who first drew the knife. RP 75, 94, 103. In addition, Seeman confirmed Mulwee's own testimony that he was yelling about killing people, but stated that he did not feel menaced or threatened by those remarks. RP 31.

Mulwee's testimony was also corroborated by defense witness Clarence Herne, who testified that he saw two men on top of Mulwee, hitting his head on the sidewalk as Mulwee described. Herne saw one of the attackers with a knife, and testified that Mulwee took the knife away and began stabbing. RP 135-36. Herne confirmed that Mulwee brought his hand around rather than stabbing in a straight manner. RP 136. He also confirmed that Mulwee threw the knife away once he was

able to get up. RP 138.

Patton was the only witness who claimed that Mulwee began stabbing Patton without provocation. RP 39. The jury could well have found Patton lacked credibility and rejected his version of events. At the time of the incident, Patton was over twice the legal limit for alcohol intoxication, and had cocaine in his system as well. RP 67-68. Thus Patton's ability to observe and remember impaired, and his behavior was likely to have been out of control, in contrast with his claims but in keeping with Mulwee's testimony. Patton's attempt to minimize his intoxication and illegal drug use further undermined his believability. RP 46-47.

Finally, Patton's testimony conflicted with that of all the other witnesses on a key point. Patton claimed that he subdued Mulwee, disarmed him and dropped the knife on the ground. RP 40, 56. The other State witnesses refuted this claim. Richard expressly stated that Patton did not disarm Mulwee. RP 100. Richard, Bianchi and Officer Meyer all confirmed Mulwee's testimony that Mulwee took the knife and threw it across the street. RP 75, 100, 103, 183-84.

In addition to Patton's credibility problems,[11] his version of the incident was inherently less plausible than Mulwee's. Unlike Patton, Mulwee forthrightly acknowledged that he had been drinking that morning. RP 155-56. He admitted that he was yelling across the street about killing people. RP 157. Given Mulwee's admitted behavior, and Patton's level of intoxication, it is significantly more plausible that Patton reacted to Mulwee by grabbing at him, as Mulwee testified, than that Mulwee began stabbing Patton with a knife for no reason at all, as Patton asserted.

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[11] This analysis does not include the fact that Patton had numerous prior convictions which, had they been properly admitted, would have undermined his credibility even further. See argument § C(7), infra.

Considering all this evidence, the jury could easily have had a reasonable doubt that Mulwee had the intent to inflict great bodily harm on Patton, and was instead reacting to an actual or reasonably perceived danger. Nevertheless, the jury might also have concluded that Mulwee, by stabbing repeatedly at Patton, did not meet the standard for lawful use of force. That possibility was greatly increased in this case by the trial court's giving the first aggressor instruction that was unsupported by the evidence, and the prosecutor's repeated burden-shifting and other misstatements of the law of self-defense. See §§ C(5) & (6), infra.

If the jury rejected self-defense, but also had a reasonable doubt as to intent to inflict great bodily harm, it should have considered whether second or third degree assault more accurately described Mulwee's conduct. If it concluded that Mulwee recklessly inflicted substantial bodily harm, whether by using unreasonable force in attempted self-defense or otherwise, the jury could have convicted Mulwee of second degree assault under RCW 9A.36.021(1)(a). Or, if the jury found that Mulwee was negligent, but not reckless, in using excessive force for self-defense, it could have convicted him of third degree assault under RCW 9A.36.031(1)(f).[12]

However, in violation of RCW 10.61.003, the jury never had the opportunity to consider RCW 9A.36.021(1) or 9A.36.031(1) because Mulwee's trial attorney did not propose instructions on the lesser degrees of assault. RP 230; CP 4-8. That failure cannot be deemed a legitimate tactical decision given the facts and circumstances of this case.

Lacking the option to convict of any lesser degree of assault, if the jury

[12] Given the weak evidence of intent to inflict great bodily harm, but substantial evidence that a deadly weapon was used, a jury might also have concluded that he committed second degree assault under RCW 9A.36.021(1)(c) or third degree assault under 9A.36.031(1)(d), even though this particular jury rejected the deadly weapon evidence for whatever reason.

rejected self-defense it had no choice but to convict of first degree assault based on Mulwee's own testimony, notwithstanding the minimal evidence of actual intent to inflict great bodily harm. Indeed, defense counsel realized too late that that is exactly what the jury did. He requested an exceptional sentence below the range based on the argument that the evidence had shown an "imperfect" claim of self-defense: Mulwee responded to a threat, but used more force than necessary in doing so. RP (Sentencing) 5-12. Counsel specifically compared the requested sentence to the standard range for second degree assault. RP (Sentencing) 5. He also acknowledged that the jury's decision to acquit on the deadly weapon special verdict -- despite the undisputed evidence that Mulwee had used a knife -- showed the jury had been divided, and chose to "split the baby." RP (Sentencing) 8.

A reasonably competent defense attorney would have recognized -- before rather than after the verdict -- the considerable risk that the jury would reject the self-defense claim, and would have provided the jury with reasonable alternatives by proposing instructions on the lesser degrees of assault. Counsel's deficient performance here is comparable to that in Thomas , 109 Wn.2d at 227-28. In that prosecution for attempting to elude a police vehicle, defense counsel failed to offer instructions explaining that the defendant's voluntary intoxication could rebut the inference of wanton and wilful conduct derived from the objective evidence of her driving. Id.

A reasonably competent attorney would also have been aware of the enormous difference in consequences for first degree, as opposed to second or third degree, assault. For Mulwee, whose offender score was zero, the standard range for first degree assault was 93 to 123 months. CP 42. The standard range for second degree assault would have been only 3 to 9 months, and for third degree would have

been only 1 to 3 months. A conviction for either of those degrees would not have resulted in much, if any confinement beyond the time Mulwee already had spent in custody waiting for trial.

Any claim that the failure to offer instructions on the lesser degrees of assault was a tactical decision is also refuted by the undisputed evidence that counsel never discussed the issue with Mulwee, and that Mulwee would have asked for lesser degree instructions had he been informed of that option. RP (Sentencing) 25-26; Appendix D.[13] Mulwee was entitled to the instructions. Tamalini, 1998 WL 149455, *3; slip op. at 4-5. Even if defense counsel disagreed, he would have been bound to follow Mulwee's request. RPC 1.2(a) states that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation[.]" In criminal defense "the objectives of representation" are quintessentially the verdict that is reached. The decision on whether to gamble on an all-or-nothing outcome, or instead to provide the jury with the option of convicting on a less-serious offense, is a thus decision which the lawyer must leave, after advice, to the client. Even assuming arguendo, contrary to the evidence discussed above, that defense counsel could conjure up a tactical reason for not requesting lesser degree instructions, his performance was still deficient (and in violation of the Rules of Professional Conduct) because he did not allow Mulwee to make this crucial decision regarding the objectives of the trial. RP (Sentencing) 25-26; RPC 1.2(a).

c. Failure to Object to Prosecutorial Misconduct

[13] As shown infra, Mulwee was denied representation by counsel to assist him in presenting evidence on the issue of trial counsel's failure to propose lesser-degree instructions. Therefore, if this Court feels that evidence of Mulwee's intent and counsel's performance is insufficient for review, the case should be remanded for a hearing at which Mulwee is provided counsel to develop the issue. § D(3).

As shown in § C(5), infra, the prosecutor committed egregious misconduct in closing argument by repeatedly asserting that Mulwee had the burden to prove self-defense, and misstating the law of self-defense in numerous other respects. Defense counsel's failure to object to this extensive misconduct is a further instance of deficient performance.[14] Washington courts have frequently held defense counsel primarily responsible for curbing prosecutorial misconduct and refused to reverse convictions where defense counsel failed to object or to object with specificity. See State v. Neidigh, 78 Wn. App. 71, 79, 895 P.2d 423 (1995); State v. Smith, 67 Wn. App. 838, 846-47, 841 P.2d 76 (1992). In light of these decisions it was deficient performance for counsel to be unaware of the responsibility to object to the extensive misconduct in this case.

d. Failure to Impeach Witness with False Statement Convictions Admitted by Trial Court

The State's entire case was based on Patton's testimony: no other witness alleged that Mulwee initiated the fight. Prior to trial, defense counsel sought to impeach Patton's testimony with his numerous prior convictions. Supp. CP ___ (Sub No. 41A, Clerk's Minutes, 11/30/95). The trial court prohibited use of most of the convictions, but granted the defense motion to admit Patton's conviction for false reporting. Id. Unaccountably, however, counsel failed to follow up by cross-examining Patton regarding the conviction.

Having prevailed on his motion, there was no tactical reason for defense counsel not to take advantage of the ruling and inform the jury of Patton's admissible

[14] Counsel did object to two instances of misconduct. RP 242-43. Moreover, as shown in § C(5)(c), the extensive misconduct requires reversal, despite the lack of additional objections, both because it is manifest constitutional error, and because it was flagrant, repeated and ill-intentioned.

conviction.[15] Indeed, convictions for making false statements would probably have a greater impact on the jury's credibility assessment than any other convictions except perjury. Even if the jury chose to disregard the conviction in assessing credibility, there is no way in which introducing the fact of the conviction could have benefitted the State's case or harmed Mulwee. Reasonably competent defense counsel would have taken the necessary steps to present the evidence to the jury. Cf. Thomas, 109 Wn.2d at 230-31 (counsel ineffective for failing to obtain qualified expert witness after recognizing that expert was needed). The failure cross-examine Patton about his false reporting conviction further demonstrates counsel's deficient performance.

e. The Deficient Performance Deprived Mulwee of a Fair Trial.

> The second prong of the Strickland test is met where there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Thomas, 109 Wn.2d at 226, quoting Strickland, 466 U.S. at 694 (emphasis added by Thomas court). The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. The multiple examples of plainly deficient performance in this case create far more than the required reasonable probability that the result would have been different without counsel's many errors.

First, Mulwee was improperly convicted of an uncharged offense because his attorney did not object to the erroneous instructions. §§ C(1) and C(2)(a), supra.

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[15] The prosecution had made no attempt to preemptively admit Pattons' prior conviction. RP 33-46; see State v. Watkins, 61 Wn. App. 552, 557-58, 811 P.2d 953 (1991) (recognizing that parties often admit prior convictions before cross-examination in an attempt to minimize potential prejudice).

Second, as shown in detail above, there is a reasonable possibility that the jury would have convicted Mulwee of a lesser degree of assault had defense counsel followed Mulwee's wishes and offered the appropriate instructions. Mulwee's testimony that he did not intend to inflict great bodily harm was at least as plausible as the State's evidence to the contrary. § C(2)(b).

Third, the jury might well have accepted Mulwee's claim of self-defense, and acquitted him entirely, were it not for the prosecutor's repeated improper argument shifting the burden of proof and misstating the law of self-defense, and the erroneous aggressor instruction. Thus there is a reasonable probability that the outcome would have been different had defense counsel adequately objected to the misconduct and the instruction. §§ C(2)(a) & (b), C(5) & C(6).

Finally, the outcome could well have been different had defense counsel followed through with his pretrial motion and impeached Patton by cross-examining on his convictions for making false statements. § C(2)(d).

The State's case here was not strong, since no other witnesses corroborated Patton's claim that Mulwee rather than Patton initiated the altercation. The rejection of the deadly weapon allegation demonstrates that the jury was not fully convinced by the State's evidence. Under all these circumstances, the numerous prejudicial errors made by defense counsel undermine confidence in the outcome and require a new trial. Thomas , 109 Wn.2d at 226, 232.

3. THE ACTUAL CONFLICT BETWEEN MULWEE'S INTERESTS AND THOSE OF HIS ATTORNEY DEPRIVED MULWEE OF HIS RIGHTS TO COUNSEL AND TO DUE PROCESS.

Prior to being sentenced, Mulwee made a pro se motion raising "fourteen reasons why . . . I believe I should have a new trial." RP (Sentencing) 26. See also

appendix D; RP (2/9/96) 6, 8-9. In particular, Mulwee asserted that his attorney had never discussed the jury instructions with him, and argued that the jury should have been instructed on second degree assault. RP (Sentencing) 25-26. He also alleged numerous other instances of ineffective assistance. Appendix D. Because the allegations, if substantiated, implicated his attorney in malpractice or professional misconduct, an actual conflict of interest precluded the attorney from continuing to represent Mulwee. United States v. Sanchez-Barreto, 93 F.3d 17, 20 (1st Cir. 1996); United States v. Ellison, 798 F.2d 1102, 1107 (7th Cir. 1986), cert. denied, 479 U.S. 1038, 107 S. Ct. 893, 93 L. Ed. 2d 845 (1987). Mulwee was denied his right to counsel and to due process when the trial court failed to inquire into the conflict or to appoint new counsel, and trial counsel not only failed to pursue Mulwee's motion, but actively precluded him from raising his concerns at sentencing.

The Sixth Amendment to the United States Constitution guarantees all those charged with criminal offenses the assistance of counsel for their defense. State v. Robinson, 79 Wn. App. 386, 393, 902 P.2d 652 (1995). This right is so basic that its denial can never be treated as harmless error. Id. (citing Chapman v. California, 386 U.S. 18, 23 & n. 8, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)). The Sixth Amendment right to counsel includes the right to assistance by a conflict-free attorney. Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); State v. Harell, 80 Wn. App. 802, 804-05, 911 P.2d 1034 (1996).

The right to a conflict-free attorney mandates the following rules:

> First, a trial court commits reversible error if it knows or reasonably should know of a particular conflict into which it fails to inquire. Second, reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance. In neither situation need prejudice be shown.

In re Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983) (emphasis added).

These rules apply to any situation where defense counsel represents conflicting interests. Richardson, 100 Wn.2d at 677. An actual conflict exists where the interests of the client conflict with those of the attorney himself. See Sanchez-Barreto, 93 F.3d at 20, and Ellison, 798 F.2d at 1107. In those both cases, the defendants moved to withdraw guilty pleas prior to sentencing, on the grounds that their attorneys improperly pressured them to plead guilty because doing so advanced the attorneys' interests. Thus the defendants' motions in essence alleged that their

attorneys had engaged in malpractice. Sanchez-Barreto, 93 F.3d at 21; Ellison, 798 F.2d at 1106.

In Ellison, the Court held that there was an actual conflict of interest because defense counsel could not pursue his client's interests free from the influence of concern about incriminating himself in malpractice, and in fact actually argued against his client. 798 F.2d at 1107. The Court noted the defendant was forced to present his motion to withdraw his plea without assistance. His own testimony was unclear, and he was unable to cross-examine his attorney regarding the advice he received. The court stated:

> Thus, defendant not only was without conflict-free representation at the hearing but also was in effect without the assistance of counsel at all, a situation that clearly calls for the application of Cuyler's[16] presumption of prejudice.

Ellison, 798 F.2d at 1108. The Court reached the same result on similar facts in Sanchez-Barreto, holding that the trial court should have appointed replacement counsel and resolved the factual dispute regarding the advice to plead guilty at an adversarial hearing. Sanchez-Barreto, 93 F.3d at 22.[17]

During the post-conviction and sentencing proceedings, Mulwee's attorney labored under the same conflict between his interests and those of his client that required reversal in Sanchez-Barreto and Ellison. Mulwee asserted that his attorney never discussed the jury instructions with him, and therefore failed to give instructions that he wanted and to which he was entitled as of right. RP 25-25, Appendix D; see § C(2)(b), supra. These claims are in essence allegations of malpractice. Based on

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[16] Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

[17] In doing so, both Courts summarily rejected prosecution claims that the defendants waived their rights to conflict-free counsel because they did not expressly ask for the appointment of new attorneys. Sanchez-Barreto, 93 F.3d at 20 (right to counsel is not contingent upon request by defendant; no indication in record of knowing and voluntary waiver of Sixth Amendment right); Ellison, 798 F.2d at 1108-09.

Mulwee's assertions, his trial counsel had violated several fundamental rules of professional conduct, including RPC 1.2(a) (abide by client's decision) and RPC 1.4 (communication with client). Moreover, as shown in § C(2)(b), the result of these violations substantially prejudiced Mulwee by violating his right to have the jury consider lesser degrees of the charged crime, which carried far less serious penalties.

Once Mulwee raised this and other claims of ineffective assistance in his oral and written pro se motions for a new trial there was an actual conflict between his interests and his attorney's. If the attorney confirmed Mulwee's claims, he risked incriminating himself; if he did not pursue the claims against himself, he failed to effectively represent Mulwee in seeking a new trial. Sanchez-Barreto, 93 F.3d at 21; Ellison, 798 F.2d at 1107. Here, unlike in the cited cases, Mulwee's attorney did not go to the extreme of becoming a witness against his client by denying his allegations. However, his actions conflicted with Mulwee's interests and denied Mulwee any representation on his motion for a new trial.

When Mulwee informed the court that he had fourteen reasons that he should have a new trial, the court correctly told him to present them at that time. RP (Sentencing) 26. Before Mulwee could do so, his attorney interrupted. After confirming that Mulwee believed he should have offered the second degree assault instruction, the attorney stated that he had advised Mulwee not to raise his request for a new trial prior to sentencing:

> What I have told him is that all aspects of the trial, including my level of competence, will be addressed at the appellate stage. And I think he wants to bring that before this court, but I have advised him there is another forum for that which is more appropriate. What we're really here for today, I have advised him, is consideration of sentencing.

RP (Sentencing) 27.

The advice that Mulwee's concerns about the attorney's competence could be considered on appeal without first being raised to the trial court was flatly wrong. Washington courts have made it clear that when a claim of ineffective assistance is brought on direct appeal, the reviewing court will not consider matters outside the trial record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Therefore by cutting short Mulwee's attempt to present his claim of ineffective assistance to the trial court, based on the false assurance that the issue would still be considered on appeal, the attorney acted in his own interest, and contrary to Mulwee's, by limiting the record on which the issue of his competence could be addressed on appeal.

As shown in argument § C(2), supra, there is more than sufficient evidence in this record, despite the attorney's efforts to silence Mulwee, to show that ineffective assistance prejudiced Mulwee and requires a new trial. However, assuming arguendo that such a showing could not be made on the existing record, the lack of an adequate record is due entirely to the actual conflict between counsel's interests and Mulwee's. As in Ellison and Sanchez-Barreto, Mulwee effectively had no representation to assist him in presenting evidence of his attorney's deficient performance to the trial judge prior to sentencing; indeed, his attorney actively precluded him from making a record on the issue. RP (Sentencing) 27.

As in those cases, and in contrast to McFarland, 127 Wn.2d at 338, Mulwee cannot be required to bring a personal restraint petition to present this evidence. The defendants in McFarland and its companion case did not allege ineffective assistance until after appealing. In contrast, Mulwee made his claim to the trial judge, and was denied conflict-free counsel to fully litigate the claim. When an actual conflict of interest such as this is shown, prejudice is presumed. Richardson, 100 Wn.2d at 677.

The Strickland requirement of actual prejudice is not applicable where defense counsel's loyalty is divided. Robinson, 79 Wn. App. at 396. Moreover, the prejudice here is obvious: Mulwee was denied the ability to fully present his motions to the trial court. At a minimum, the case should be reversed and remanded for a hearing at which Mulwee is assisted by conflict-free counsel to fully present the evidence in support of his motions for a new trial. Ellison, 798 F.2d at 1109; Sanchez-Barreto, 93 F.3d at 22.

In addition to the obvious prejudice on the motion for a new trial, Mulwee was presumptively prejudiced at sentencing by counsel's conflict of interest. Richardson, 100 Wn.2d at 677; Robinson, 79 Wn. App. at 396. Mulwee's attorney argued for an exceptional sentence below the range, but was unsuccessful. RP (Sentencing) 5-12, 40. An attorney unburdened by the conflict might well have been more successful in convincing the judge to exercise his discretion and impose an exceptional sentence, either because his advocacy was more persuasive, or because he elicited evidence in support of the motion for a new trial that swayed the judge toward leniency. Therefore, the case should be remanded not only for the new trial motion, but also a new sentencing hearing if the motion is not granted. Richardson, 100 Wn.2d at 677; Robinson, 79 Wn. App. at 396.[18]

4. THE PROSECUTOR VIOLATED MULWEE'S CONSTITUTIONAL RIGHT TO REMAIN SILENT BY COMMENTING ON HIS FAILURE TO TELL HIS STORY TO THE POLICE DURING THE FOUR MONTHS PRIOR TO TRIAL.

The Fifth and Fourteenth Amendments to the United States Constitution forbid the prosecution from commenting on an accused's silence. Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233, 14 L. Ed. 2d 106 (1965). In

[18] A new restitution hearing is required for the same reason, in addition to the denial of Mulwee's right to be present. § C(9), infra.

Washington, the State may not use either pre-arrest or post-arrest silence against a defendant. State v. Keene, 86 Wn. App. 589, 592-93, 938 P.2d 839 (1997) (citing State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988); and State v. Easter, 130 Wn.2d 228, 241, 243, 922 P.2d 1285 (1996)).

The prosecutor violated this fundamental rule and denied Mulwee his constitutional rights by commenting at length on the fact that Mulwee did not tell the arresting officer that he was defending himself from Patton, and did not come forward to tell his story in the four months between the incident and the trial. RP 241.

This comment on Mulwee's exercise of his right to silence is impermissible and requires reversal. Keene, 86 Wn. App. at 594; State v. Heller, 58 Wn. App. 414, 422, 793 P.2d 461 (1990). In Heller, as here, the defendant (who was charged with robbery) argued that she acted in self-defense. She testified that she and the complaining witness had agreed to an act of prostitution. However, the man attacked her and she pulled a knife to defend herself. 58 Wn. App. at 416. The prosecution introduced testimony that when questioned by the police, Heller asserted she did not know what they were talking about. The prosecutor then asked Heller whether she had told the police that she only stabbed the man in self-defense, and questioned her about the fact that she did not ever tell police or prosecutors that the man had tried to rape her. Id., at 416-17. This Court held that the prosecutor was entitled to cross-examine Heller about her statement that she did not know what the police were talking about, because the statement was inconsistent with her trial testimony that she was involved but acted in self-defense. Id., at 418. However, the Court held that questioning Heller about why she never returned to the police or went to the prosecutor to correct her statement, following her initial interrogation, was error because it commented on her silence or suggested to the jury that the silence implied guilt. Id., at 419-21.

In Keene, the defendant was charged with rape of a child. The prosecutor elicited testimony that the investigating detective told Keene if she did not hear from Keene she would turn the case over to the prosecutor's office, and that Keene did not respond. The prosecutor then asked the jury in closing whether the failure to respond was the act of a person who had not committed the crime. Id., at 592. The Court of Appeals held that this argument, by suggesting that the defendant's silence was an admission of guilt, was an impermissible comment. Id., at 594.

The prosecutor's comment on Mulwee's silence here is indistinguishable from the impermissible comments in Keene and Heller. Indeed, the impermissible comment is more egregious than in Heller. There, the defendant's statement to police was inconsistent with her trial testimony; here Mulwee acknowledged at trial that while in police custody he was saying that he would kill people. RP 185-86. Since

there was no inconsistency, the prosecutor should not have mentioned Mulwee's decision to exercise his right to silence rather than explaining to police that he had acted in self-defense. Heller, 58 Wn. App. at 418.

Even if this initial comment were permissible, the prosecutor went on to commit the exact error that required reversal in Heller. He told the jury that Mulwee did not come forward to explain his actions "in August, September, October [or] November," just as the prosecutor in Heller pointed out that the defendant never went to the police or prosecutor with her claim of self-defense. RP 241; Heller, 58 Wn. App at 420-21. The prosecutor's argument that Mulwee failed to mention his claim of self-defense before trial, like the argument in Keene, 86 Wn. App. at 594, suggested that Mulwee's silence was an admission that he did not really act in self-defense and was therefore guilty.

Impermissible comment on a defendant's silence, like that here, is a manifest constitutional error which can be raised on appeal despite the lack of objection at trial. Keene, 86 Wn. App. at 592; Heller, 58 Wn. App. at 417, n. 1. Because it is constitutional error, the State bears the burden of showing that the error was harmless. Keene, 86 Wn. App. at 594. "When reviewing a constitutional error to determine if it is harmless, the court looks only at the untainted evidence to determine if that evidence is so overwhelming it 'necessarily leads to a finding of guilt'." Heller, 58 Wn. App. at 421.

In making this determination, the court considers whether the defendant testified, so that his credibility was at issue:

> Because credibility determinations cannot be duplicated by a review of the written record, at least in cases where the defendant's exculpating story is not facially unbelievable, this court is not in a position to say, beyond a reasonable doubt, that any reasonable jury would have reached the same result, absent the prejudicial error committed.

Heller (quoting State v. Gutierrez, 50 Wn. App. 583, 591, 749 P.2d 213 (1988)). In Heller, the defendant testified to her version of the facts, the State admitted on appeal that the defendant's credibility was at issue, and Heller's story was reasonably plausible and not facially unbelievable. Heller, 58 Wn. App. at 422. Therefore, the error was not harmless, and the conviction was reversed. Id.; see also Keene, 86 Wn. App. at 595 (error not harmless because untainted evidence did not necessarily lead to a finding of guilt).

All these factors are present in Mulwee's case. Like Heller, he testified that he had acted in self-defense. The trial prosecutor acknowledged that credibility was the key issue: "this whole case boils down to who you believe." RP 232. The

prosecutor repeatedly attacked Mulwee's credibility, and used the impermissible comment on silence for this purpose. RP 233, 234, 235, 240, 241. Finally, as argued earlier Mulwee's testimony was corroborated by other witnesses, including those called by the State, was at least as plausible as Patton's account, and was certainly not facially unbelievable. The impermissible attack on Mulwee's exercise of his constitutional right, in order to undermine his credibility, was not harmless, and requires reversal independent of the other errors in this case. Heller, 58 Wn. App. at 422; Keene, 86 Wn. App. at 595.

5. PROSECUTORIAL MISCONDUCT DEPRIVED MULWEE OF A FAIR TRIAL.

a. The Prosecutor Repeatedly and Impermissibly Shifted the Burden to Mulwee.

The prosecutor wrongly and repeatedly told the jury that Mulwee had the burden of convincing them that he had acted in self-defense. He stated "[t]hat is only a defense if the 12 of you absolutely, positively believe . . . that the offense happened exactly they way he said." RP 236. He asserted "there are only four things that the State must prove beyond a reasonable doubt and those four things are contained [in the to convict instruction]." RP 237. The prosecutor concluded his rebuttal closing by again insisting that "[i]n order to use self-defense the 12 of you must believe he's entitled to it." RP 284-85. This repeated argument unconstitutionally shifted the burden of proof from the State to Mulwee.

When any evidence of self-defense is presented, the State must disprove self-defense beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984); see State v. McCullum, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983). The jury instructions must unambiguously inform the jury that the State has the burden of proving absence of self-defense beyond a reasonable doubt. Acosta, 101 Wn.2d at 621.

Here the trial court's "to convict" instruction did not list absence of self-defense as an element the State had to prove beyond a reasonable doubt. CP 15 (Instruction 4). Although the separate self-defense instruction, CP 19, attempted to place the burden of proof on the State, the prosecutor's repeated improper argument ensured that the jury was not unambiguously informed of the State's burden, as required by Acosta.[19]

The assertion that self-defense is a defense only if all twelve jurors believed Mulwee's testimony deliberately and improperly informed the jury that Mulwee had the burden to convince the jury with regard to self-defense. RP 236, 237, 285. In fact, since the State had the burden to disprove self-defense beyond a reasonable doubt, the jury did not need to believe Mulwee -- and certainly did not need to "absolutely, positively believe . . . that the offense happened exactly the way he said" -- order to acquit. The jury had to acquit if it was not convinced beyond a reasonable doubt of the absence of self-defense. The jury could have reached such a conclusion even without fully accepting Mulwee' version of the incident. By telling the jurors that they could not acquit on the basis of self-defense unless they affirmatively believed all of the defendant's testimony, the prosecutor deprived Mulwee of his constitutional right to have the State prove every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).

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[19] The improper argument in this case illustrates the danger of the practice, approved in Acosta, 101 Wn.2d at 622, of using a separate instruction to explain the State's burden on self-defense rather than listing absence of self-defense in the to convict instruction.

The prosecutor compounded the constitutional error when he suggested that testimony that would not justify a conviction if presented by the State could not be used by the defense either. RP 242-43. As defense counsel correctly noted, this argument improperly implied that the State and defense had the same burden of proof. Id. In fact, just as with Mulwee's own testimony, jurors did not need to believe Herne beyond a reasonable doubt in order to convict; they merely needed to find his testimony sufficiently plausible to raise a reasonable doubt in their minds as to the State's proof.

However, the court's response to the defense objection did not unambiguously inform the jury of this principle. The trial court instructed that the State only had the burden of proving "its case," and that the burden lasted only "through the plaintiff's case." RP 242-43. The jury could well have understood this oral instruction as relieving the State of the burden on self-defense, which was, as the prosecutor repetitively noted, not listed in the "to convict" instruction as part of the State's case. Thus, far from curing the error, the court's oral instruction greatly increased the likelihood that the jury would accept the prosecutor's claim that Mulwee had to convince them he had acted in self-defense. Reversal is required because the prosecutor's improper argument and the court's inadequate response ensured that the jurors were not unambiguously informed of the State's burden to prove absence of self-defense beyond a reasonable doubt. Acosta, 101 Wn.2d at 621.

b. The Prosecutor Misstated the Law of Self-defense.

In addition to shifting the burden of proof on self-defense, the prosecutor flagrantly misstated the principles of law applicable to self-defense in at least three respects.

First, the prosecutor falsely asserted that Instruction 12 (CP 23), the "no

duty to retreat" instruction, "doesn't apply to the defendant. He didn't have a right to be there." RP 284. This claim is contrary to established case law and to the facts of this case.

Instruction 12 is based on WPIC 17.05, which must be given when the defendant is in a place where he has a right to be. See Comment to WPIC 17.05 (emphasis added). Failure to give the instruction when supported by the evidence is reversible error. Id. (citing State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984)).

The defense, not the State, proposed Instruction 12. CP 7; see Supp. CP ___ (Sub No. 40, State's Proposed Instructions). Therefore, the instruction was proposed to benefit Mulwee, not Patton. To give the instruction, the trial court had to find that the evidence supported it. Allery, 101 Wn.2d at 598. Thus the court necessarily found that Mulwee was in a place he had a right to be; otherwise the court would have refused the defense request. The court's ruling was entirely correct. The prosecutor's claim that Mulwee had no right to be on a public sidewalk merely because a private security guard told him he could not drink there and to move along lacks any foundation in law.

Even assuming arguendo that some law did prohibit Mulwee's presence on the public way, that law was not part of this case. The State did not object to the court's decision to give the no duty to retreat instruction on Mulwee's behalf. RP 229-30. The prosecutor therefore misstated not only the law of self-defense, but also the law of the case, when he contradicted the court's ruling by claiming that the instruction did not apply to Mulwee. See State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984) (prosecutor committed reversible error by arguing accomplice liability when that issue was not included in instructions).

Second, the prosecutor wrongly sought to convince the jurors to apply an objective standard of reasonableness in evaluating self-defense. He paraphrased the self-defense instruction, omitting the requirement that the jury view the circumstances "as they appeared to the person, taking into account all of the facts and circumstances known to the person at the time of and prior to the incident." RP 247; see CP 19 (Instruction 8). He then stated:

> So you have got to find that he was acting as a reasonable person in order for him to say he was acting in self-defense. If you believe he was acting unreasonable [sic], he can't use self-defense.

RP 247 (emphasis added).

In fact, it has long been the law in Washington that a jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm; a finding of actual imminent harm is not required. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996) (emphasis added). Moreover, the subjective standard must be "manifestly apparent to the average juror." Id. at 900.

In State v. Wanrow, 88 Wn.2d 221, 240-41, 559 P.2d 548 (1977), the court held that, where the defendant was a woman, it was prejudicial error to instruct on reasonable use of force using the masculine gender, and to instruct that a defendant has no right to use a weapon "unless he believes, and has reasonable grounds to believe, that he is in imminent danger of death or great bodily harm." 88 Wn.2d at 239 (emphasis supplied by court).

Like the instruction in Wanrow, the prosecutor here misstated the law by implying that the jury should employ an objective standard of reasonableness. He argued that jurors should measure Mulwee's conduct based on what they themselves believed was reasonable, rather than determining whether Mulwee's beliefs were

subjectively reasonable based on all the facts and circumstances he was aware of, including the recent prior stabbing assault against him.

Although the court gave an instruction which attempts to incorporate the subjective standard set out in the above cases, CP 19, neither this instruction nor any others explicitly informed the jury that the standard to employ was in fact subjective. Therefore, the prosecutor's argument in favor of an objective standard ensured that the correct standard was not "manifestly apparent" to the jurors who determined Mulwee's fate. This violated the clear law of Washington. Wanrow, 88 Wn.2d at 241.

Third, the prosecutor misstated the law and the evidence in discussing Instruction 10, CP 21, the aggressor instruction. The prosecutor asserted that the instruction applied to Mulwee's shouting on the street corner that he was going to kill people, and argued "if you think and believe that his conduct provoked this fight with Mr. Patton, then he is not entitled as a matter of law to say he acted in self-defense." RP 245-46.

In fact, the aggressor instruction applies only when the defendant creates the need to act in self-defense by an intentional act that reasonably provokes a belligerent response from the victim. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998). As shown below, Mulwee's shouting on the street was not such an act, and did not support an aggressor instruction in this case. See argument § C(6), infra. Moreover, the prosecutor's suggestion that Mulwee's shouting provoked the fight is not supported by either Patton's or Mulwee's testimony. Id.

For the prosecutor to misstate the law to the jury "is a serious irregularity having the grave potential to mislead the jury." Davenport , 100 Wn.2d at 763. The prosecutor's complete misstatement of the law on the duty to retreat, the subjective

standard of reasonableness, and the aggressor instruction were such an irregularity. Independently and in combination with the repeated burden-shifting arguments discussed earlier, this irregularity requires reversal.

c. The Misconduct Warrants Reversal Because it Included Manifest Constitutional Error and Because it was Repeated, Flagrant and Ill-Intentioned.

The prosecutor's repeated attempts to shift the burden and his many misstatements of the law require reversal regardless of any failure to preserve the error at trial. As shown above, improper prosecutorial comment on a defendant's silence is manifest error affecting constitutional rights. Keene, 86 Wn. App. at 592; Heller, 58 Wn. App. at 417 n. 1 (citing State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988)). This Court in Heller and Division Two in Keene applied the constitutional harmless error standard, rather than utilizing the standard for review of prosecutorial misconduct. Keene, 86 Wn. App. at 594; Heller, 58 Wn. App. at 421; see § C(4).

The prosecutor's comments shifting the burden of proof on self-defense, and misstating the applicable law, are just as much manifest constitutional error as drawing attention to a defendant's exercise of his right to silence. Shifting the burden of proof to the defense is an error that can be raised for the first time on appeal. Scott , 110 Wn.2d at 688, n. 5. Errors affecting a defendant's self-defense claim are constitutional in nature. Birnel, 89 Wn. App. at 473 (citing McCullum, 98 Wn.2d at 497). The prosecutor's wrongful insistence that jurors consider self-defense only if they believed Mulwee entirely, and his other misstatements, allowed jurors to improperly disregard self-defense, and thus omit one of the elements of the charge. Scott , 110 Wn.2d at 688, n. 5. Since this misconduct prevented the jury from fairly considering the claim of self-defense, it is of true constitutional magnitude and warrants reversal. Id.

Further, the Washington Supreme Court has held that where prosecutorial misconduct is flagrant and ill-intentioned, it requires reversal despite the lack of an objection at trial. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). In Charlton, the prosecutor made a single reference to the defendant's failure to call his wife as a witness on his behalf. No curative instruction was requested. 90 Wn.2d at 660-61. The Supreme Court reasoned that the prosecutor was "unquestionably aware" of the statutory spousal privilege and that "[p]resumably, he, like most prosecutors, was acquainted" with long-standing case law which prohibits commenting on the exercise of this privilege. Id. at 661. The court said:

> We can only conclude, therefore, that the comment upon which it was hoped the jurors would ground the desired, impermissible inference was mindful, flagrant, and ill-intentioned conduct. Petitioner did not, therefore, waive his right to object to conduct of this sort by failing to request a curative instruction.

Charlton, 90 Wn.2d at 663-64.

This court can presume that the experienced prosecutor[20] knew the law of self-defense as set forth by the Supreme Court in Wanrow, McCullum, Allery, Acosta, and other decisions. Nevertheless, the prosecutor, not once, as in Charlton, but eight separate times, made arguments which shifted the burden or otherwise directly contradicted well-settled law. RP 236, 237, 242-43, 246, 247, 284, 285. These on-going misstatements of law, which the prosecutor knew or should have known were improper, are far more flagrant and ill-intentioned than the single improper reference in Charlton. As in that case, they require reversal. 90 Wn.2d at 664, 666.[21]

The sum total of misconduct in this case is also greater than or comparable to that in other cases where reversal was required. State v. Alexander, 64 Wn. App. 147, 155-56, 822 P.2d 1250 (1992) (repeated attempts in closing to instill inadmissible evidence in jurors' minds, following repeated attempts to elicit testimony that had been excluded); State v. Powell, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991), rev. denied, 118 Wn.2d 1013 (1992) (single argument that not guilty verdict in child molestation case would declare open season on children); State v. Claflin, 38

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[20] The case was tried by a "Senior Deputy" in the King County prosecutor's office; Greg Jackson. His bar number is 17541, indicating admission to practice in 1987 or 1988.

[21] As this Court has recently stated, "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 1997).

Wn. App. 847, 850, 690 P.2d 1186 (1984) (reading poem describing effect of rape during closing). The pattern of misconduct in this case deprived Mulwee of a fair trial. Reversal is required.

6. THERE WAS NO EVIDENCE TO SUPPORT THE AGGRESSOR INSTRUCTION.

"[A]ggressor instructions are not favored." State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998). Although aggressor instructions have been used when warranted, it is reversible error to give such an instruction when it is not supported by the evidence. Id.; State v. Brower, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986).

To support an aggressor instruction, there must be evidence that the defendant was involved in unlawful conduct--other than the alleged assault itself--which precipitated the incident. Brower, 43 Wn. App. at 902. The provoking act must be intentional and one that a jury could reasonably assume would provoke a belligerent response from the victim. Birnel, 89 Wn. App. at 473.

In Birnel, the Court of Appeals reversed a murder conviction because the evidence did not support the aggressor instruction that was given. The defendant had stabbed his wife multiple times; he claimed that she attacked him with the knife when they argued over her drug use. The evidence showed that the defendant asked his wife if she was on drugs and if that was where the money was going, and that he searched her purse for drugs. The Court held that this evidence did not support the instruction because a juror could not reasonably assume that the defendant's conduct would provoke an attack with a knife. 89 Wn. App. at 473.

In Brower, the defendant's companion argued with the victim over a drug deal. The defendant, who testified that the victim was acting aggressively toward him, drew a gun and pointed it at the victim, for which he was charged with assault.

The court stated:

> If Mr. Brower was to be perceived as the aggressor, it was only in terms of the assault itself. Under the facts of this case, the aggressor instruction was improper.

Brower, 43 Wn. App. at 902.

As in the above cases, there is no evidence here which would support an aggressor instruction. The prosecutor's suggestion that Mulwee's verbal conduct provoked the fight with Patton is not supported by any evidence. If the jury accepted Patton's testimony, they could have found that after yelling angrily at others, Mulwee began directing his comments toward Patton. However, Patton testified that he did not take the remarks seriously, and expressly denied that he responded at all, let alone in a belligerent manner, until he was physically attacked. RP 38-40. Conversely, Mulwee acknowledged yelling at the man across the street, but denied that he said anything to Patton, and testified that Patton approached and then attacked him. RP 157-61. Thus regardless of which version the jury believed, there was no evidence that Mulwee did any unlawful and intentional act that provoked a belligerent response from Patton, except for the stabbing that constituted the act of self-defense or assault itself. Thus there was no support for the first aggressor instruction.

Mulwee's testimony was more than sufficient to raise self-defense as an issue for the jury to consider. McCullum, 98 Wn.2d at 488. Nevertheless, the aggressor instruction told the jury that self-defense was not available if they concluded Mulwee was the aggressor and started the fight. CP 21 (Instruction 10). Since the only possible aggressive or provocative act the jury could find is stabbing Patton, which is the assault (or act of self-defense) itself, giving the aggressor instruction here effectively deprived Mulwee of his ability to claim self-defense. Brower, 43 Wn.

App. at 902.

The error is constitutional and requires reversal unless it is harmless beyond a reasonable doubt. Birnel, 89 Wn. App. at 473. As there, the importance the State assigned to the issue at trial, evidenced by the prosecutor's argument and cross-examination, shows that the error was not harmless. Id. In addition, the prejudicial impact of the instruction here is illustrated by the jury's divided verdict. The acquittal on the deadly weapon verdict shows that they were not fully convinced by Patton's testimony or the State's argument. Instead, the jury may have found the confrontation occurred in the manner Mulwee described, but applied the aggressor instruction and concluded from it that self-defense was not available. As in Birnel and Brower, the instruction deprived Mulwee of his defense to the assault charge even if the jury accepted his testimony. Reversal is required.

7. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF PATTON'S PRIOR CONVICTIONS.

Under ER 609, Mulwee sought to challenge the credibility of Patton, the key witness against him, with evidence of Patton's numerous prior convictions. The trial court refused to admit Patton's three convictions for second degree assault, his conviction for threats, and his conviction for violation of the Uniform Controlled Substances Act. Supp CP ___ (Sub No. 41A, Clerk's Minutes, 11/20/95). Most of the ER 609 argument and ruling has not been transcribed for review. As shown in § C(8), infra, therefore, if the record were insufficient for this Court to decide the issue, the conviction should be reversed for lack of an adequate record. However, the existing record is in fact sufficient to demonstrate that the trial court abused its discretion and violated Mulwee's constitutional right to confrontation and to present a defense when it denied his ER 609 motions.

When the State seeks to impeach a testifying defendant with prior convictions pursuant to ER 609, the trial court must balance the probative value of the conviction against the prejudice to the defendant. State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled in part on other grounds by State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991). This is necessary because the inherent prejudice of prior conviction evidence adversely impacts a defendant's constitutional right to testify in his defense. Id., at 119-20. Thus the most important consideration is the importance of hearing the defendant's side of the story. Id.

Other factors that the trial court should consider in weighing a defendant's prior conviction under ER 609 include:

> (1) the length of the defendant's criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime.

State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980).

Although recognizing that prior convictions for crimes of assault may not always be probative of credibility, Washington courts have not hesitated to admit such crimes against defendants under the Alexis factors. See State v. Renfro, 96 Wn.2d 902, 908, 639 P.2d 737 (1982) (rape); State v. Saldano, 36 Wn. App. 344, 349, 675 P.2d 1231, rev. denied, 102 Wn.2d 1018 (1984) (assault); State v. Jobe, 30 Wn. App. 331, 633 P.2d 1349 (1981) (assault).

Since such convictions can be admitted against criminal defendants, despite the constitutional rights at stake, they are certainly admissible against a witness, like Patton, whose constitutional rights are not at stake. While the Alexis factors refer to a defendant's prior convictions, those that apply to other witnesses militate strongly in favor of admission here.

As in many cases, factor (5) is crucial. Credibility was the central issue in this case. Patton portrayed himself as a peaceful individual merely eating his chicken when attacked for no reason. In fact, however, Patton had an extensive record for violence. The trial court's refusal to admit the assault convictions denied Mulwee the opportunity to challenge Patton's credibility on this crucial point. Factors (3) and (6), the nature and impeachment value of the prior conviction favor admissibility for the

same reason. Factor (1) also argues for admission. Patton's record was extensive, but the trial court's ruling precluded the jury from knowing most of that record. Again, that allowed Patton to bolster his credibility by portraying himself as a peaceful, law-abiding person, which he is not.

Factors (2) and (4) do not compel a contrary result. The existent record suggests that the trial court denied admission of the assault convictions primarily because it considered them too remote. RP 8. In so ruling, the court was evidently swayed by the prosecutor's argument that the 10-year limit in ER 609 is measured from the witness's first release from custody, rather than the most recent release. RP 7. In fact, that argument is directly contrary to this Court's decision in State v. O'Dell, 70 Wn. App. 560, 854 P.2d 1096 (1993), cert. denied, ___ U.S. ___, 127 L. Ed. 2d 666, 114 S. Ct. 1316.[22] The defendant in O'Dell, like Patton, had initially been released on his prior conviction, but was subsequently confined on a parole violation and released less than ten years before trial. This Court expressly rejected the argument made by the prosecutor in Mulwee's case, and held that the time period specified in ER 609 is measured from the latest release following confinement for a parole violation on the underlying conviction. O'Dell, 70 Wn. App. at 567. Here, Patton was released from confinement for his assault convictions in June, 1994, just a little more than a year before he testified against Mulwee. RP 6. The trial court erred in finding the convictions too remote.

Finally, even if the Alexis factors -- designed to protect defendants' rights -- did not fully support admissibility, Mulwee's constitutional right to confront witnesses and present a defense mandated that he be allowed to present relevant evidence of Patton's prior convictions. As this Court has recognized, a criminal defendant's constitutional right to confront witnesses may take precedence over rules such as ER 609. State v. McDaniel, 83 Wn. App. 179, 188 n. 5, 920 P.2d 1218 (1996), rev. denied, 131 Wn.2d 1011 (1997). The Sixth Amendment to the United States Constitution and Const. art. 1, § 22 guarantee criminal defendants the right to confront and cross-examine adverse witnesses. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); McDaniel , 83 Wn. App. at 185. In McDaniel , this Court held that these constitutional rights were violated when the trial court prevented the defendant from cross-examining a prosecution witness about previous lies under oath, and about being on probation for a prior conviction, which provided a motive for those lies. 83 Wn. App. at 186. Likewise, Mulwee's constitutional rights were violated when he was unable to challenge Patton's claims to being peaceful and non-confrontational with evidence of his prior record for assault and threats. This Court should reverse Mulwee's conviction.

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[22] The prosecutor's attempt to mislead the trial court on an issue of settled law is a further example of the pervasive misconduct in this trial. See §§ C(4) & (5).

8. IF THE RECORD IS INADEQUATE FOR REVIEW, THE CONVICTION MUST BE REVERSED.

The court reporter for the November 30, 1995, pretrial hearing did not prepare a report of those proceedings. After lengthy consideration of the issue, the superior court found that it is not possible to reconstruct a verbatim or narrative report of that hearing. Supp. CP ___ (Sub No. 84). The missing report of proceedings is relevant to several of the issues raised above, including defense counsel's failure to impeach Patton with the false reporting convictions that the trial court admitted, and the exclusion of Patton's other convictions. §§ C(2)(d) and C(7). As shown in those sections, the existing record is sufficient for this Court to review those issues.[23]

However, if this Court concludes otherwise, then Mulwee's conviction must be reversed because he has been denied his constitutional right to an adequate record on appeal. It is the duty of the State to provide a record of sufficient completeness for appellate review. State v. Larson, 62 Wn.2d 64, 66, 381 P.2d 120 (1963) (quoting Draper v. Washington, 372 U.S. 487, 496, 9 L. Ed. 2d 899, 83 S. Ct. 774 (1963)) (emphasis added). In Larson, the Supreme Court ordered that either the verbatim record be furnished or a new trial granted. 62 Wn.2d at 67.

Mulwee had neither the ability nor the responsibility to ensure that the court reporter assigned to his case was competent and prepared an adequate verbatim report. Rather, the clerk of the superior court had the statutory duty to provide a record of the court's proceedings. State v. Woods, 72 Wn. App. 544, 550, 865 P.2d 33 (1994) (citing Const. art 4, § 11, RCW 2.08.030 and RCW 2.32.050(2)). In

[23] Mr. Mulwee may choose to raise additional issues in his pr se supplemental brief. The record may not be adequate to review those issues, in which case reversal and remand may well be appropriate.

Woods, the Court of Appeals held that the trial court's failure to record a contested hearing in a paternity case denied Woods a complete record on appeal. Id. at 551. The Court further held that "as Woods was not responsible for the lack of a record, it would be unreasonable to hold that Woods waived his right to a complete record." Id. at 552; see also State v. Thomas, 70 Wn. App. 296, 852 P.2d 1130 (1993), and State v. Young, 70 Wn. App. 528, 856 P.2d 399 (1993).

The above precedent is clear. If this court finds that the missing transcript precludes review of the issues Mulwee has raised on appeal, his conviction should be reversed for that reason.

9. THE RESTITUTION ORDER ENTERED IN VIOLATION OF MULWEE'S RIGHT TO BE PRESENT SHOULD BE VACATED.

Imposition of restitution is part of sentencing. RCW 9.94A.120(12). A defendant has a constitutional right to be present for sentencing. State v. Duvall, 86 Wn. App. 871, 874 n. 3, 940 P.2d 671 (1997) (citing United States v. Gagnon, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). Mulwee explicitly refused to waive his right to be present when restitution was set. RP (Sentencing) 40, 45; CP 41-46.

The court violated Mulwee's right to be present at sentencing when it signed the order without holding a hearing at which Mulwee was present.[24] Duvall, 86 Wn. App. at 874. The constitutional violation was exacerbated by the fact that there was an actual conflict between defense counsel's interests and Mulwee's interests at the time counsel permitted the order to be entered in Mulwee's absence. See argument § C(2)(3), supra. Therefore, in addition to the other reasons for reversing the judgment and sentence, the restitution order should be vacated.

D. CONCLUSION

[24] There is no indication that either the prosecutor or defense counsel brought Mulwee's desire to be present to the attention of the judge who signed he restitution order, who was not the judge who had sentenced Mulwee.

For all the reasons set forth above, Mulwee's conviction should be reversed and remanded for a new trial. If the Court disagrees, the case must nonetheless be remanded with directions to appoint conflict-free counsel to represent Mulwee in his motion for a new trial and (if necessary) at sentencing. The restitution order also should be vacated.

DATED this ____ day of April, 1998.

Respectfully submitted,

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